88-2038

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

C. Phillips Ferguson
Commonwealth's Attorney
City of Suffolk
P. O. Box 1811
Suffolk, Virginia 23434
(804) 934-3111, Ext. 300

QUESTION PRESENTED FOR REVIEW

Where the defendant invoked his right to have counsel present during custodial interrogation, was there a valid waiver of the right established and thus whether the use of his confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation.

TABLE OF CONTENTS

Page

Question Presented for Review. 1

Table of Authorities. 3

Statement of the Case. 6

Reasons for Denying the Writ

and Argument. 14

Conclusion. 32

Certificate of Service. . . . 32

TABLE OF AUTHORITIES

Cases	Page
Bradley v. Commonwealth, 196 Va. 1126, 1136, 86 S.E.2d 828 (1955)	31
Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984)	18
Bunch v. Commonwealth, 225 Va. 423, 435, 304 S.E.2d 271 (1983)	23
Cardinale v. Louisiana, 394 U.S. 437, 438 (1969)	15
Edwards v. Arizona, 451 U.S. 477, 482, reh'g denied, 452 U.S. 973 (1981)	21
Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)	17
Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952)	18
Graver Tank & Manufacturing Company v. Linde Air Products Company, 336 U.S. 271, 275 (1949)	17
Grayson v. Harris, 267 U.S. 352, 358 (1925)	18
Miranda v. Arizona, 384 U.S. 436, (1966)	29
Oregon v. Bradshaw, 103 S.Ct. 2830, 2835 (1983)	22

Page

Oregon v. Mathiason, 429 U.S. 492 (1977)..... 16

Portland Ry. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913)..... 18

Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689 (1980)..... 23

Rogers v. Lodge, 458 U.S. 613, 623 (1982)..... 17

Smith v. Illinois, 105 S.Ct. 490 (1984)..... 27

Miscellaneous

Rules of the Supreme Court of the United States..... 16

No._____

In The

SUPREME COURT of the UNITED STATES

_____ Term, 1989

MELVIN ALLEN LIVERMAN, JR.,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, the Commonwealth of Virginia, respectfully prays that the petition for Writ of Certiorari sought by petitioner to review the judgment of the Virginia Supreme Court entered on February 21, 1989, be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete. Therefore, the Commonwealth would add the following facts.

At the suppression hearing, Detective J. D. Bangley testified that he arrived at the Suffolk Police Department at approximately 3:00 p.m. on the day of the shooting. At 6:00 p.m., the defendant called the Suffolk Police Department because he had received information that the police were looking for him. The officer who answered the telephone call advised the defendant that they would like to talk to him about something. The defendant told the officer that he would come to police headquarters. Within seconds, the defendant called the Suffolk Police Department a second time and informed the officer that his car was not working. At that point, the officer advised the

defendant that the police would be glad to give him a ride from Smithfield to Suffolk. The defendant agreed to this arrangement. (Tr. pp. 18-20 & 96). Detective Bangley and Detective W. M. Brooks left the Suffolk Police Department at 6:00 p.m., arrived in Smithfield at the defendant's home at 6:30 p.m., and returned to Suffolk with Liverman at 7:00 p.m. (Tr. p. 129). In route to Suffolk, the only conversation about the investigation was initiated by the defendant when he asked the detectives what they wanted to talk to him about. Detective Bangley's response was that they had heard that he had been in Riverview that day and they wanted to know if he had seen anything at the Hobbs' residence because there had been a shooting incident involving Mrs. Hobbs. Detective Bangley made no reference to Mrs. Hobbs being dead or alive. That conversation was the only reference made

to the investigation. (Tr. p. 98).

After the defendant arrived at the Suffolk Police Department, Detective Bangley advised him of his Miranda rights at 7:09 p.m. (Tr. p. 99). The defendant executed a legal rights form. At this point, the defendant was advised that Mrs. Hobbs had died. (Tr. p. 100). At 7:10 p.m., the defendant made a statement in which he denied knowing anything about the incident. Detective Creekmore entered the room that Detective Bangley and the defendant were in and asked the defendant if they could take a gun powder residue test. He explained to the defendant exactly how and where it would be taken and what the results would show. The defendant said that he wanted a lawyer before he took any test. (Tr. pp. 27 & 103). Detective Bangley then asked the defendant if the statement which he just made was freely and voluntary given. The defendant answered

"I want to talk to a lawyer." (Tr. pp. 29 & 102). Detective Bangley ceased all questioning and left the room. (Tr. pp. 29 & 103).

At this point, Detective Bangley, Detective Creekmore and Lieutenant Cipra observed the defendant doing something with his hands, rubbing his hands on his pants and picking at his fingernails. Lieutenant Cipra entered the room and gave the defendant a Suffolk phone book and a Norfolk/Portsmouth phone book and advised him to find an attorney. (Tr. p. 104). Lieutenant Cipra left the room and he, Detective Bangley and Detective Creekmore observed on the monitor that the defendant was licking his hands in the exact location where he had been advised the test would be taken and then began rubbing his hands on his pants. Lieutenant Cipra, Detective Bangley and Detective Creekmore then went into the room and Lieutenant Cipra advised

the defendant that the test would be taken but that no one would question him. (Tr. p. 104). The test was taken.

The three officers then left the defendant alone with the phone books. The officers viewed the defendant on the monitor as he was looking through the phone books. After approximately ten minutes. Detective Bangley returned to the room and asked the defendant if he had found an attorney.

At this point, the defendant began telling Detective Bangley various incidents that had happened to him. He told Bangley he could not trust anyone and that he had had threats made upon his life. He said he had consulted with a judge in Richmond and talked with Judge Godwin in Suffolk but that neither believed him and nothing had been done. The defendant continued by talking about incidents which involved people at various schools he had attended,

Chief Jackson of the Suffolk Police Department and G. S. Hobbs and Trip Hobbs, the husband and son, respectively, of the decedent. (Tr. pp. 105, 120, 122). Detective Bangley informed the defendant that if these things were true and if he, Liverman, wished to talk to somebody about these matters in greater detail, then he would listen. (Tr. p. 122). The defendant then told Detective Bangley that he wanted to talk to him about them but that he did not want to say it out loud but that he would write it down. Detective Bangley advised the defendant that he would give the defendant a pen and paper and that he would leave the room so the defendant would have the privacy to write down what he had to say. Detective Bangley gave the defendant the pen and paper and then left the room. (Tr. p. 122). Liverman was left alone.

Detective Bangley observed the

defendant on the monitor. When the defendant stopped writing, the detective returned to the room and read what the defendant had written. The defendant had written that he had killed Sarah Hobbs. After Detective Bangley read the paragraph, he advised the defendant that "if he would, [he] would like to talk to him some more about what he had wrote down." The defendant told the detective that he would talk to him. (Tr. p. 124).

The second statement was taken by Detective Bangley at approximately 8:00 p.m. (Tr. p. 113). Detective Bangley testified there were only three police officers involved in the investigation. He further testified that he entered the room only three times and he was the only one present during the first statement and during the second statement. He also stated that no one ever told the defendant that he had to talk to the police. The

defendant was not threatened or forced to talk with the detective. (Tr. p. 124).

Detective Bangley read each page of the second statement to the defendant and the defendant signed and initialed each page and signed the statement. (Tr. pp. 125-127).

At the suppression hearing, the defendant testified that he did not make the statements which were introduced into evidence. He stated that the statement and signatures were forgeries. (Tr. pp. 10, 70, 74, 75, 78, 79, 83, 84). He further testified that the police were in and out of the room approximately twelve times, that they threatened him, and that they told him that they knew he had killed Mrs. Hobbs. However, Liverman could not identify any of the officers except Detective Bangley. Liverman testified that he requested an attorney on at least twelve occasions. (Tr. pp. 29, 34, 36, 41, 44,

50, 51, 66, 67, 68).

The trial court found Detective Bangley to be the credible witness and held that the statement was admissible. Consequently, at the trial, Detective Bangley testified with regard to the defendant's actions and behaviors on October 8, 1984, and read the inculpatory statement to the jury.

REASONS FOR DENYING THE WRIT AND ARGUMENT

THIS IS NOT A PROPER CASE FOR EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION.

A. The issue is not properly before this Court because the question presented is not the same claim litigated below, nor is it the issue argued in the petition for a writ of certiorari.

The question presented by petitioner is not the same issue which was litigated in the appellate courts below. Petitioner now seems to assert that regardless of how the interrogation of petitioner was reinitiated, there was no valid subsequent

waiver of his right to counsel. However, in the body of the petition and in the state courts, petitioner focused his argument upon the reinitiation issue. This Court should not grant a writ of certiorari to review a claim that has not been passed upon by the appropriate appellate court. Because the issue was not addressed to Supreme Court of Virginia or the Court of Appeals of Virginia, the record is not fully developed and petitioner has bypassed an available remedy. In keeping with established practice, the Court should refuse "to decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

B. The issue presented in this case is not of sufficient importance to warrant exercise of this Court's certiorari jurisdiction.

Petitioner's claim fails to raise an issue which is worthy of this Court's

exercise of certiorari jurisdiction. Presumably, petitioner would argue that, pursuant to Rule 17.1(c) of the Rules of the Supreme Court of the United States, the state courts decided a federal question in a way in conflict with applicable decisions of this Court. Certainly, no other considerations governing review on certiorari are applicable in this case. However, there is, in fact, no conflict and therefore this is not an appropriate case to be considered by this Court. This is not a situation, such as Oregon v. Mathiason, 429 U.S. 492 (1977), in which certiorari was granted because the state court had "read Miranda too broadly." Id. at 493.

Rather, this case involves nothing more than petitioner's disagreement with the state court's resolution of factual matters. It is well settled that this Court will not exert its jurisdiction merely

to review a decision of a state court upon a question of fact except "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." Fiske v. Kansas, 274 U.S. 380, 385-86 (1927). Indeed, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." Rogers v. Lodge, 458 U.S. 613, 623 (1982).

> A court of law, such as this Court is, rather than a court for correction of errors and factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Company v. Linde Air Products Company, 336 U.S. 271, 275 (1949). In this case, as will be discussed below, there was ample evidence

to establish that as a matter of fact the petitioner reinitiated the interrogation and he subsequently voluntarily waived his right to counsel. His complaint, in essence, is nothing more than an assertion that his testimony, rather than that of the police officers, should have been accepted. Such a distinct factual question should not be examined by this Court. See Grayson v. Harris, 267 U.S. 352, 258 (1925); Portland Ry. Co. v. Railroad Commission, 229 U.S. 397, 412 (1913); Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952).

C. There is no merit to Petitioner's claim that he was denied his right to counsel under the Fifth and Fourteenth Amendments.

In Bradshaw v. Commonwealth, 228 Va. 484, 323 S.E.2d 567 (1984), the defendant contended that the trial court should have suppressed his confession because it was obtained while he was in custody and after

he had requested an attorney. The police advised the defendant of his Miranda rights and he executed a written waiver of these rights. During the interview, the defendant denied any involvement in the crime being investigated. The police informed the defendant that several witnesses had seen his car at the scene of the crime and that he killed the victim because of his jealousy concerning his wife. At that point, the defendant said that he wanted to talk to an attorney. The police ceased interrogation and requested that the defendant have his attorney contact the police to discuss the possibility of a polygraph examination. The police seized two 12-gauge shotguns and told the defendant that they wanted to have them tested. As the officer was writing a receipt for one of the

guns, Bradshaw spontaneously remarked, "That's not the one that did it." The police officer asked if he wanted "to talk about it." Id. at 489. The defendant said that he did. He then gave a fifteen to twenty minute statement admitting that he shot the victim. The defendant repeated the statement to his father in the presence of the police and later gave a written signed confession.

The Virginia Supreme Court held that an accused may waive his constitutional right to counsel, provided the waiver is made voluntarily, knowingly and intelligently. The Court continued by stating that whether a suspect makes a knowing and intelligent relinquishment or abandonment of his rights depends on the totality of the facts and circumstances of each

case. Id.

> During a custodial interrogation, if a suspect requests an attorney, the interrogation must cease until an attorney is present. (cites omitted). Such a request, however, does not protect a suspect when he makes a spontaneous admission not induced or initiated by the police, (cite omitted), or when 'the accused himself initiates further communication, exchanges or conversations with the police.' (cite omitted). Id. at 490.

The Court in Bradshaw held that the statement was made voluntarily and constituted "a knowing and intelligent relinquishment or abandonment of a known right." Id. (quoting Edwards v. Arizona, 451 U.S. 477, 482, reh'g denied, 452 U.S. 973 (1981)). The Bradshaw case is on all fours with the case at bar. Liverman denied any involvement in the murder in his first statement. After Detective Creekmore explained the gun powder residue

test and requested that they be allowed to take one, Liverman requested an attorney before the taking of a test. Detective Bangley proceeded to ask the standard final three non-offense related questions and Liverman responded, "I want to speak to an attorney" after the second question. Detective Bangley ceased all questioning immediately and left the room. Detective Bangley scrupulously honored the defendant's request for counsel.

Liverman was provided with a Suffolk phone book and a Norfolk phone book and was told to find an attorney. When Detective Bangley asked Liverman if he had found an attorney, Detective Bangley was merely asking a standard custodial question. That question was not interrogation. The term "interrogation" does not refer to words or actions on the part of the police that are normally attendant to arrest and custody. Oregon

v. Bradshaw, 103 S.Ct. 2830, 2835 (1983); Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689 (1980).

In Bunch v. Commonwealth, 225 Va. 423, 435, 304 S.E.2d 271 (1983), the Virginia Supreme Court held that police may legitimately inquire whether a suspect has changed his mind about speaking to an attorney. The Court further stated that the police officer's inquiry whether Bunch "felt he was ready to sit down and go over the case" amounted to nothing more than an effort to ascertain if Bunch had changed his mind about wanting an attorney, and, hence, did not amount to police-initiated interrogation within the meaning of Edwards. Id. at 435.

In the case at bar, Detective Bangley merely asked Liverman if he had found an attorney. Detective Bangley never asked Liverman if he was ready to go over the case. Therefore, Detective Bangley's

inquiry did not go as far as the inquiry in Bunch which the Court held to be a legitimate inquiry and not police-initiated interrogation. After Liverman gave his narrative statement about threats on his life and various incidents involving G. S. Hobbs, Trip Hobbs and others, to Detective Bangley, the detective merely advised Liverman that if these things were true and if he, Liverman, wished to talk about these matters in greater detail, then he would listen. This statement was the same statement the detective in Bradshaw made to the defendant in that case and which the Court held not to be interrogation. Once Liverman re-initiated communication with Detective Bangley, he was no longer protected from interrogation. Bradshaw, 228 Va. at 490.

The defendant cites Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), in support of his motion to suppress the

confession. In Edwards, the defendant requested an attorney "before making a deal" and the questioning ceased. The defendant was taken to the jail and the next morning, two detectives came to the jail to talk to him. The guard told Edwards that "he had" to talk and he then took Edwards to the detectives. Id. at 1882. The Court held that an accused having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. Id. at 1885 (emphasis added). The Court continued by stating that had Edwards initiated the meeting, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them

against him at trial.

In the case at bar, unlike Edwards, Liverman voluntarily initiated further communication, exchanges, or conversations with the police.

When Liverman initiated communication with the police, he knowingly and intelligently waived his previously invoked right to counsel and thus became subject to further interrogation by the authorities. Id. at 1885. Once Liverman waived his right to counsel, the waiver continued to be in effect throughout any subsequent custodial interrogation. After Liverman initiated communication with the police, he did not thereafter request counsel. Furthermore, at no time did Detective Bangley or any other police officer indicate to Liverman that "he had" to talk. Finally, Detective Bangley did not resume questioning Liverman until Liverman specifically chose to talk with him.

The defendant also cites Smith v. Illinois, 105 S. Ct. 490 (1984), as controlling authority for the case at bar. However, the United States Supreme Court decision in that case was a narrow one. Id. at 495. The Court held that the rule which states "[a]n accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' (cite omitted) unless he validly waives his earlier request for the assistance of counsel," embodies two distinct inquiries. Id. at 492-93.

> First, courts must determine whether the accused actually invoked his right to counsel. (cites omitted). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only in finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. (cite omitted). Id. at 493.

The Court stated "[t]his case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance." Id. An accused's subsequent statements are relevant only to the question whether the accused waived the right he invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together. Id. at 494. The Court held "only that, under the clear logical force of settled precedent, an accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." Id. at 495.

The issue in the case at bar is whether the defendant waived the right he invoked. Therefore, Smith v. Illinois, supra, is not applicable.

The defendant also contends that the police should have done more than give the defendant two phone books. Detective Bangley testified that he asked the defendant if he had found an attorney because if he had then he would have allowed the defendant to contact one. The decision in Miranda v. Arizona, 384 U.S. 436 (1966).

> does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. Id. at 474.

At 7:09 p.m., Detective Bangley advised Liverman of his Miranda rights and Liverman executed a Suffolk Police Department Legal Rights Advice Form. Liverman knew that he was entitled to a lawyer and in fact invoked this right. He was provided with two phone books so that he could find a

lawyer. The Suffolk Police did not question Liverman during the period of time that the Fifth Amendment privilege was in effect. However, once Liverman voluntarily initiated conversation with Detective Bangley, he waived his previously invoked right to counsel and, therefore, was subject to questioning by the police.

Even then, Bangley questioned Liverman only after Liverman (1) knowingly and intelligently waived his right to counsel; (2) initiated conversation with Detective Bangley in narrative form; (3) out of the presence of Detective Bangley wrote that he had murdered Mrs. Hobbs; and (4) specifically chose to talk with Detective Bangley.

In short, the Suffolk Police made no threats, promises or inducements to Liverman to get him to talk. Liverman was properly advised of his rights and he understood those rights. Within a short

period of time after requesting an attorney, he changed his mind and gave a voluntary statement without any impropriety on the part of the police whatsoever.

The issue of whether his constitutional right to counsel was violated rests on the credibility of the witnesses. The evidence produced at the suppression hearing clearly and convincingly established the credibility of Detective Bangley and discredited the defendant.

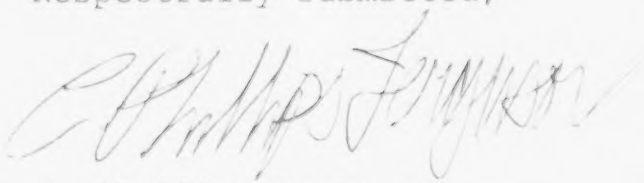
The Virginia Supreme Court has ruled that in testing the credibility and weight to be ascribed to the evidence, trial courts must be given the wide discretion to which a living, rather than printed, record logically entitles it. Bradley v. Commonwealth, 196 Va. 1126, 1136, 86 S.E.2d 828 (1955). When this rule of law is considered with the Commonwealth's evidence, it is clear that the trial judge made his decision properly. It was based

soundly and firmly upon the law and facts presented.

CONCLUSION

The Appellant's Petition for a Writ of Certiorari is wholly without merit. It has basis in neither fact nor law. Therefore, the Commonwealth of Virginia respectfully requests that this case not be reviewed and that the decision of the Virginia Supreme Court not be disturbed.

Respectfully submitted,



C. Phillips Ferguson
Commonwealth's Attorney for the
City of Suffolk
Counsel For Respondent
The Commonwealth of Virginia

C. Phillips Ferguson
Commonwealth's Attorney
P. O. Box 1811
Suffolk, Virginia 23434

CERTIFICATE OF SERVICE

I, C. Phillips Ferguson, Commonwealth's Attorney for the City of Suffolk, Virginia,

hereby certify that a true copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari was this 5th day of September, 1989, mailed postage pre-paid to H. Woodrow Crook, Jr., Esquire, Counsel for Petitioner, P. O. Box 406, Smithfield, Virginia 23430, and to The Honorable Mary Sue Terry, Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

C. Phillips Ferguson

C. Phillips Ferguson
Commonwealth's Attorney